

Portugal enacts legislation to assist international criminal tribunals

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B. Portugal Enacts Legislation to Assist International Criminal Tribunals

By Andre Klip¹

Portugal is in the process of enacting legislation in order to assist the International Criminal Tribunals for Rwanda and for the Former Yugoslavia. The draft act is now pending before Parliament.¹ After the first number of the national implementing laws, it seems that for a long time states have been inactive to adapt their national legislation in order to be able to fulfill the obligations deriving from the Statutes of the two International Criminal Tribunals. Although Portugal is rather late in this respect, the draft act shows that the government was able to profit from the examples of other national implementing laws.²

In its Explanatory Memorandum the Portuguese government underlines the primacy of the obligations under the statutes over national law. It specifically refers to issues related to the manner in which evidence is collected as well as to the differences between international cooperation in criminal matters between equal states and the cooperation with the Tribunals. The necessity for a change in Portuguese law especially derives from the concept of concurring jurisdiction, the application of *non bis in idem* principle, the powers of the Prosecutor, the detention of the accused and the execution of sentences imposed by the Tribunals.

Article 1 of the Draft Act recognizes the obligations deriving from the Security Council Resolutions and the Statutes of the Tribunals to cooperate with the latter. Article 2 deals with concurring jurisdiction. Paragraph 1 of Article 2 allows Portuguese authorities to defer its competence to the Tribunals. Paragraph 5 of Article 2, however, provides two grounds for refusal: a) when it comes to offenses which are not subject to any proceeding pending before Portuguese authorities; b) when it comes to offenses which do not belong to the territorial or temporary competence of the Tribunals, as defined in the respective Statutes. The ground for refusal under a) seems to be superfluous. Portugal cannot defer something which it does not have. This should not be regarded as a refusal. The ground under b) raises the question whether the definition of the crimes is determined by the Statutes only, or whether subsequent case law of both Tribunals will taken into consideration. Either way, one must doubt whether states may have any discretionary power left to decide that a case does not belong to the competence of the Tribunal, if the Tribunal itself shows (through its request) that it considers itself to be competent.

Article 3 regulates the consequences in Portugal of a deferral. Such a decision must be registered. It suspends the application of the statute of limitations until a definitive decision of the Tribunal has been taken on its competence to try the offenses which are the object of the request. Paragraph 5 of Article 3 stipulates that a Portuguese authority may never create a positive conflict of jurisdiction in the decision to defer. In the three situation the suspended Portuguese proceedings shall be reopened (Art. 4): a) when the Prosecutor decides not to indict; b) when the indictment was not confirmed by the Tribunal; c) when the Tribunal declares itself incompetent. In cases in which the Portuguese proceedings have been reopened, the statute of limitations runs again from the moment of opening (Art. 4, par. 2).

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² See <http://www.mj.gov.pt/novidades/PropLei243-VII.htm>.

³ See for a discussion of other national implementing legislation: *Legislation enacted by Ten Different Nations on Judicial Assistance to the International Criminal Tribunal*, 11 INT'L ENFORCEMENT L. REP. 329-332, (1995); *Rwanda and Yugoslav Tribunals: Improving Legislation on Cooperation*, 12 INT'L ENFORCEMENT L. REP. 315-318, (1996); *Rwanda and Yugoslav Tribunals: Implementing Legislation on Cooperation*, 12 INT'L ENFORCEMENT L. REP. 365-367, (1996).



The Prosecutor herself may investigate in Portuguese territory (Art. 5). Portugal shall give the necessary support to the Tribunal. The country will not give its permission to practices prohibited under Portuguese law as well as to investigations which endanger the sovereignty and security of the State (Art. 5, par. 6). Both the Prosecutor as well as the judges of the Tribunal may be present during the investigations in Portugal (Art. 13). In the light of the rights of the defense, one might have expected to see a provision allowing the defense to be present here as well. Article 6 gives the title for arrests to be made in Portugal. Articles 7, 8, and 9 deal with the legal remedies the arrested person enjoys in Portugal as well as the subsequent transfer to the Tribunal. Grounds to refuse the arrest, transfer and surrender to the Tribunal can be found in Article 10: a) when the order of the arrest was not duly signed by a judge of the Tribunal; b) when the Tribunal was temporarily or territorially incompetent; c) when it is established that the detained person is not the person wanted by the Tribunal.

The enforcement of sentences is dealt with in Article 11. Portugal will follow the regular rules relating to the execution of sentences of other states. This refers to articles 234-240 of the Código de Processo Penal. This means, for instance, that double criminality is required. Portuguese law governs the execution of the penalty with the exception of conditional release. (Art. 11, par. 2). Portugal will not execute a penalty imposed which is longer than the penalty provided in its Penal Code. The country also follows the general accepted rule that the Tribunal will have the final word in matters of amnesty and pardon. Thus, it seems that Portugal has all necessary legislation at its disposal to declare its willingness to execute sentences imposed by the Tribunals.

Articles 14 provides for the detention and transport of persons (also other than the accused) for the time necessary for the investigation. This concerns only cases in which the person has failed to respond to appear before the Tribunal without any justification; where the appearance of a specific person is considered to be essential and in which the costs of the transport as well as the return to Portugal shall be borne by the Tribunal.

Article 15 criminalizes perjury committed in Portugal during investigations initiated by the Tribunal. The crime of Article 360 of the Código de Processo Penal (falsidad de testimonio) is thus considered to be committed before a Portuguese Tribunal. However, prosecution may only take place on request of the Tribunal. In this respect the Portuguese law is similar to the law of the host state of the Yugoslav Tribunal, the Netherlands, which Penal Code provides for a penalty of nine years in cases of perjury before an international Tribunal.²¹

XII. INTERNATIONAL FRAUD AND MONEY LAUNDERING

A. Antigua Arrests U.S. National in Florida Fraud Allegation

On May 18, 1999, Antiguan authorities arrested William W. Cooper, a major player in Antigua's international financial services sector, in connection with fraud allegations pending in U.S. District Court in Gainesville, Florida. The indictment accuses Mr. Cooper and others of conspiring to launder money in connection with a wire fraud.²²

According to a media article, the charges come from a four-year investigation into a venture-capital project in which U.S. Customs Service officials claim more than 400 victims lost more than \$60 million in the largest non-drug money-laundering case that Customs has ever uncovered. Among the alleged victims are professional athletes

²¹ See also André Klip, *Witnesses Before the International Criminal Tribunal for the Former Yugoslavia*, 67 INTERNATIONAL REVIEW OF PENAL LAW 277-279 (1996).

²² Michael Allen, *Antigua Makes Arrest in Florida Case in Apparent Effort to Placate the U.S.*, WALL ST. JOURNAL, May 21, 1999, at A11, col. 1.